Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

WESTERN MANAGEMENT INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below err by denying discovery of the IRS and Tax Court's role in passing retroactive federal legislation? The legislation restored the Tax Court's social security tax deficiency jurisdiction in this case. The refusal of discovery was contrary to *Ballard v. Commissioner of Internal Revenue*, 544 U.S. 40, 125 S.Ct. 1270, 161 L. Ed 2d 227 (2005).

2. Can the courts below completely ignore jurisdictional federal statutes prohibiting assessment of unemployment taxes and interest to enter a judgment for the tax plus interest?

3. The courts below decided that the title "officer" automatically transmuted independent contractor services into employee wages. The Ninth Circuit misinterpreted 26 U.S.C. 3121(a), (c) and (d)(1). This decision conflicts with this Court's decision in *Clackamas Gastroenterology v. Wells*, 538 U.S. 440, 123 S.Ct. 1673, 155 L. Ed 615 (2003) and also conflicts with the First, Second, Fourth, Fifth, Seventh and Eighth Circuit decisions.

PARTIES TO THE PROCEEDING

Respondent Commissioner of Internal Revenue was the Respondent-Appellee below and Western Management, Inc., a Washington State corporation, was the Petitioner-Appellant below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
A. Factual Background	5
B. Proceedings Below	6
CONCLUSION	14
APPENDIX A:	
Court of Appeals Opinion 2006 WL 991875 (2006)	1a
APPENDIX B:	
Tax Court Opinion T.C. Memo 2003-162	7a
APPENDIX C:	
Order on Motion for Reconsideration August 20, 2003	17a
APPENDIX D:	
Motion to Compel June 26, 2001 pages 1, 14, 15	25a
APPENDIX E:	
Response to Motion to Compel filed August 1, 2001 pages 1, 24, 25	28a

TABLE OF CONTENTS—Continued

Page

APPENDIX F:

Order Denying Motion to Compel August 8, 2001 ... 30a

APPENDIX G:

Order of Dismissal of deficiency portion October 14, 1999 ..... 31a

APPENDIX H:

Relevant pages of Notice of determination dated July 27, 1999..... 32a

APPENDIX I:

Order to Reinstate Deficiency portion February 8, 2001 ..... 39a

APPENDIX J:

Stipulation filed January 29, 2002..... 40a

APPENDIX K:

Statutory Provisions Involved 42a

APPENDIX L:

Treasury Regulation § 31.3121(c), (d)-1 (a) and (b)... 49a

TABLE OF AUTHORITIES

CASES — Page

Arbaugh v. Y & H Corporation, 546 U.S. ___ 126 S.Ct. 1235, 163 L. Ed 2d 1097 (2006)..... 8

Ballard v. Commissioner of Internal Revenue, 544 U.S. 40, 125 S.Ct. 1270, 161 L. Ed 2d 227 (2005)..... i, 2, 4

Bowen v. Kizer, 485 U.S. 386, 108 S. Ct. 1200, 99 L. Ed 2d 402 (1988)..... 7

Califano v. Goldfarb, 430 U.S. 199, 206, 97 S.Ct. 1021, 51 L. Ed 2d 270 (1977)..... 8

Califano v. Wescott, 443 U.S. 76, 88-9, 99 S.Ct. 2655, 61 L. Ed 2d 382 (1979)..... 13

Clackamas Gastroenterology v. Wells, 538 U.S. 440, 123 S.Ct. 1673, 155 L. Ed 2d 615 (2003).. i, 8, 9

Clendenen v. Commissioner of Internal Revenue, 207 F.3d 1071 (8th Cir. 2000)..... 11

Cubanski v. Heckler, 794 F.2d 540, 546 (9th Cir. 1986)..... 7

Deecy Products v. Welch, 124 F.2d 592, 596 (1st Cir. 1941)..... 9, 12

Hart v. Massanari, 266 F.3d1155, 1176 (9th Cir. 2001)..... 7

Independent Petroleum v. Fly, 141 F.2d 189 (5th Cir. 1944)..... 9, 12

Inter-City Truck Lines LTD v. United States, 408 F.2d 686, 687 (Ct. Cl. 1969)..... 13

Joyce v Mathews, 569 F.2d 1039, 1041(8th Cir. 1978)..... 11

Solon v. Kaplan, 398 F.3d 629, 632 (7th Cir. 2005)..... 11, 12

United States v. Bernstein, 179 F.2d 105 (4th Cir. 1949)..... 12

United States v. Aberdeen Aerie, 148 F.2d 655, 657 (9th Cir.)..... 12

TABLE OF AUTHORITIES—Continued

	Page
United States v. Griswold, 124 F.2d 599 (1st Cir. 1941)	12
FEDERAL STATUTES	
26 U.S.C. 3121	i
26 U.S.C. 3121(a)	i, 11
26 U.S.C. 3121(a)(1)	11
26 U.S.C. 3121(a)(c)	i
26 U.S.C. 3121(c)	12
26 U.S.C. 3121(d)(1)	9, 11, 12
26 U.S.C. 3121(d)(3)	11
26 U.S.C. 6201	2
26 U.S.C. 6201(b)(2)	2, 7
26 U.S.C. 6201(b)(2) and 26	6
26 U.S.C. 6601(i)	6, 7
26 U.S.C. 7436	2, 3, 4
26U.S.C. 3121(d)(3)(A)	11
28 U.S.C. § 1254(1)	1
42 U.S.C. 410	11
Community Renewal Relief Act of 2000, P.L. 106-554, 114 Stat. 2763	4
STATE STATUTES	
Wash. Rev. Code 18.100.010	10
Wash. Rev. Code 18.100.010, 060	2, 10
Wash. Rev. Code 18.100.060	10
Wash. Rev. Code 18.100.065	10
Wash. Rev. Code 18.100.065 and 070	10
Wash. Rev. Code 50.04.140	2
Wash. Rev. Code 50.04.140(2)(c)	2, 8
FEDERAL REGULATIONS	
26 C.F.R. § 31.3121	9
26 C.F.R. § 31.3121(c)-1(d)	9, 13

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page

Alex Kosinski, "The Wrong Stuff" 1992 B.Y.U. L.Rev. 325, 327 8

Chad M. Oldfather, *Defining Judicial Activism; Models of Adjudication and the Duty to Decide*, 94 Geo. L.J. 121, 162 (2005) 7

Patrick J. Schlitz, *Much Ado About Little; Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*. 62 Wash. & Lee L. Rev. 1429 (2005)..... 7

Revenue Ruling 58-505, 1958-2 C.B. 728 ..... 2, 9

IN THE

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No. 05-___

WESTERN MANAGEMENT INC.,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is unofficially published at 2006 WL 991875 and 91 AFTR 2d 2006-149. It is reprinted Pet. App. 1a-6a to the Petition. The case was decided April 12, 2006. The Tax Court Opinion is reported as T.C. Memo 2003-162, June 3, 2003 and is reprinted at Pet. App.7a-16a. Also attached is the Tax Court's Order on Reconsideration dated August 20, 2003 Pet. App. 17a-24a.

JURISDICTION

The Court of Appeals entered its judgment on April 12, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves, 26 U.S.C. 7436; the employment tax statutes 26 U.S.C. 3121(a)(c) and (d)(1); Unemployment tax statutes 26 U.S.C. 6201(b)(2) and 26 U.S.C. 6601(i) and Tax Court Rules 70 and 71. It also involves the State of Washington Unemployment Tax Statute. Wash. Rev. Code 50.04.140(2)(c) and the professional corporation statutes. Wash. Rev. Code 18.100.010, 060 Wash. Rev. Code 18.100.065 and 070. Also cited is Revenue Ruling 58-505, 1958-2 C.B. 728. The pertinent provisions are reproduced at Pet. App.42a-48a.

STATEMENT OF THE CASE

This Petition seeks certiorari to review the withholding tax judgment of the Ninth Circuit Court of Appeals against a deemed employer of an owner-worker of a professional corporation. The attorney owner paid all his income and social security tax on money distributed from Petitioner. The IRS seeks to be paid twice. It is of great importance to all small business in this country as it involves the "pay as you go" withholding tax and social security of small business owners who work for wholly owned corporations.

This Court has jurisdiction to grant certiorari as a conflict of Circuits has occurred. Further, the Ninth Circuit did not apply *Ballard v. Commissioner of Internal Revenue*, 544 U.S. 40, 59, 125 S. Ct. 1270, 161 L.Ed2d 227 (2005) ordering the Court to follow its own rules and allow its decision making process to be "transparent".

After both parties rested, Congress, on December 23, 2000, amended 26 U.S.C. 7436 and retroactively granted jurisdiction to determine a deficiency in employment tax. Petitioner requested discovery. Petitioner propounded two interrogatories (Pet. App. 25a-27a) requesting IRS and/or Tax

Court participation in proposing the change in the Tax Court's employment tax jurisdiction. They are:

> INTERROGATORY NO. 29: Please list, identify or otherwise indicate any and all documents or information of any kind or type in possession of any office of the Internal Revenue Service or the United States Department of Justice, Court of Federal Claims or any department or division of Department of Justice that will lead to relevant evidence of the participation in any way with the United States Tax court or any member of Congress that participated or was in any way involved or affiliated in any way with the amendment of 26 U.S.C. 7436 in December of 2000.
>
> INTERROGATORY NO. 30: Please list, identify, or otherwise indicate all contacts made in any way with the Tax Court personnel or members of Congress concerning any discussion of the amendment to 26 U.S.C. 7436 in December of 2000.

In it's response filed August 1, 2001(Pet. App. 28a-29a), the IRS answered; "that the legislative process cannot be challenged in this proceeding as it is not relevant to the subject matter within the meaning of Tax Court Rule 70(b)(1) and it is not information that appears reasonably calculated to lead to the discovery of admissible evidence."

In it's motion to compel (Pet. App. 25a), Western Management stated; that ". . . Petitioner is entitled to determine ex parte communication between the Tax Court personnel and Respondent, if any." The IRS never answered Interrogatory No. 29. The supplemental response by the IRS to question 30 was; "Respondent further answers that there was no exparte communication between Tax Court personnel and Respondent about this case at all." The answer is preposterous as the IRS had to contact the Tax Court exparte to supplement the answer. Further, there is no law prohibiting discovery of exparte efforts to change the law to obtain jurisdiction of a

dismissed deficiency assessment. On August 10, 2001, Trial Court Judge Maurice B. Foley denied the motion to compel both answers. Pet. App. 30a.

Petitioner employed two persons as actual employees, withheld tax and social security from their pay, filed its 940 and 941 employment tax forms and paid the required amounts to the IRS. The owner filed his 1040 returns and reported the money drawn from the income and paid all his taxes including his social security taxes in the form of self employment taxes. The IRS wanted unemployment tax from him even though he was a licensed professional and also wanted the Petitioner to be liable for withholding taxes even though all the taxes at issue were paid by the owner with the personal 1040 returns.

REASONS FOR GRANTING THE PETITION

Ballard v. Commissioner of Internal Revenue, 544 U.S. 40, 59, 125 S.Ct. 1270, 161 L.Ed 2d 227 (2005) held "The Tax Court, like all other decisionmaking tribunals, is obligated to follow its own Rules". The Ninth Circuit in this case refused to follow *Ballard* as it affirmed the Tax Court denial of Petitioner's request to find out why the Internal Revenue and the Tax Court amended its jurisdictional statute 26 U.S.C. 7436. (Community Renewal Relief Act of 2000, P.L. 106-554, 114 Stat. 2763, December 21, 2000). The act contained ten words: "and the proper amount of employment tax under such determination." The amount of employment tax was dismissed from the petition in this case on November 13, 1999. Pet. App. 31a. This case was tried and both sides rested on October 18, 2000. After the law was passed, the Tax Court reopened the trial and sustained the deficiency.

A. Denial of critical discovery of the IRS and Tax Court activity in getting Congress to pass interim legislation reinstating the deficiency portion of Petitioner's case violates the Tax Court's own rules and denies due process.

On the Tax Court's own motion, the assessment for $82,019 was dismissed so the case merely became a declaratory judgment action with no financial damage to Petitioner. After the case was tried, the law was changed by the opposing party. Since it involved the Tax court's jurisdiction it would be incomprehensible to assume that no Tax Court personnel would have anything to do with passage of the law. It further stretches all imagination to assume that the IRS knew nothing about the Tax Court's role in passing the legislation. After the retroactive legislation was passed, the case was reinstated and the demand for $82,019 was reasserted. Pet. App. 39a. The ten word law was in an obscure portion of new legislation without published committee hearings. The request of Petitioner is indisputable. It wanted to know why the law was changed and how it could be held liable for a previously dismissed deficiency after the case was tried essentially as a declaratory judgment action. After the new law was passed, then Tax Court Chief Judge Wells reinstated the deficiency previously dismissed by Chief Judge Cohen by vacating Judge Cohen's order. Pet. App. 39a. The fact that the Chief Judges entered orders in the case tried by Judge Foley, indicates activity by the Tax Court in the legislation. Tax Court rules 70(b) and 71 allow discovery of all information that "appears reasonably calculated to lead to discovery of admissible evidence." The IRS says that any information of discovery of any activities of opposing counsel on legislation directly affecting Petitioner is not relevant. The Tax Court Trial Judge, Maurice B. Foley, who probably should have recused himself, denied Petitioner's motion to compel. Pet. App. 30a. This information is critical to obtain data leading to admissible evidence.

The result to Petitioner is that it will never find out why the opposing party to the litigation, probably with cooperation of the Tax Court Judges, changed the law after trial. The new law resulted in an amended retroactive law restoring a money judgment action against Petitioner. If the tables were turned and Petitioner proposed the retroactive law and lobbied Congress, the motion to compel would easily have been granted. Petitioner's case may have been the only case in such a position and amounted to special legislation. Retroactivity is of extreme interest to Petitioner. It is also very possible that IRS meetings with Congress mentioned pending cases, that the meetings would reveal admissions against interest or possibly grounds to recuse Judge Foley or all Tax Court Judges who may have participated. The IRS denied that it had an exparte discussions about the case with the Tax Court but failed to detail what it knew about Tax Court participation or its own participation. If public hearings were held, both the Tax Court and the IRS should have notified the Petitioner so that its directors could testify.

While speculative, the Chief Judge may have indicated to Judge Foley that he should postpone his opinion until the law was amended. The IRS may have known this but refused to notify Petitioner. Unless this Court digs up this skeleton, Petitioner will never be able to know or use any of the denied information on the legislation allowing a retroactive judgment after the case was tried.

B. Entry of a judgment on unemployment tax and affirmance when both Courts either failed to mention or follow 26 U.S.C. 6201(b)(2) and 26 U.S.C. 6601(i) flatly prohibiting the judgment or interest on the judgment is a denial of due process.

None of the opinions in this case mention 26 U.S.C. 6601(i), the section prohibiting an interest assessment for unpaid unemployment taxes. This section is contained within

Chapter 63 of the Internal Revenue Code granting assessment authority to the Secretary of Treasury. The Ninth Circuit, without authority, in a *non sequitur* statement, held that an assessment could be made only if an annual return is filed. Pet. App. 1a-6a. 26 U.S.C. 6201 (b)(2) expressly prevents the unemployment tax assessment and 26 U.S.C. 6601 (i) interest in the assessment. Neither court had any jurisdiction to enter the judgment and side stepped Petitioner's citation or lack of authority including the statutes that deny jurisdiction. The statute, 26 U.S.C. 6201(b)(2) states, "other period" which obviously includes an annual period. Both courts entered the judgment without a finding of its respective jurisdiction to enter the judgment. "In law, as in life, two wrongs add up to two wrongs, nothing more." *Cubanski v. Heckler*, 794 F.2d 540, 546 (9th Cir. 1986); (Kozinski, J., dissent, *vacated as moot sub nom*; *Bowen v. Kizer*, 485 U.S. 386, 108 S. Ct. 1200, 99 L. Ed 2d 402 (1988).

Opinions do not have to review all legal issues but must first determine jurisdiction to enter a judgment. "The rule of decision cannot simply be announced, it must be selected after consideration of the relevant legal and policy considerations." *Hart v. Massanari*, 266 F.3d 1155, 1176 (9th Cir. 2001). "Can a court simply declare a winner, or must it provide some explanation for the result it reached?" Chad M. Oldfather, *Defining Judicial Activism: Models of Adjudication and the Duty to Decide*, 94 Geo. L.J. 121, 162 (2005). The article, also at 162, indicates that the pressure of growing case loads leads to minimal decisions. The Ninth Circuit reportedly handles 40% of its dispositions by relying on oral presentations of a staff attorney to decide fifty or more cases a day. Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions.* 62 Wash. & Lee. L. Rev. 1429, 1487 (2005). The article also states at page 1478 that the Ninth Circuit Judges signs off on 490 cases a year per judge. Judge Alex Kosinski, in 1992, stated that Ninth Circuit Judges read about 3500

pages of briefs per month. Alex Kosinski, *"The Wrong Stuff"* 1992 B.Y.U. L.Rev. 325, 327. Jurisdictional issues may be raised at any time, including after judgment. *Arbaugh v. Y & H Corporation*, 546 U.S. ___ 126 S.Ct. 1235, 163 L. Ed 2d 1097 (2006). Further, the State law, Wash. Rev. Code 50.04.140 (2)(c) denies unemployment compensation to individuals engaged in an independent profession. Treas. Regs. § 31.3121 (d)-1(c) echo the state law stating:

> An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public are independent contractors and not employees.

Payment into a fund that only pays benefits to others is a due process violation. *Califano v. Goldfarb*, 430 U.S. 199, 206, 97 S.Ct. 1021, 51 L. Ed 2d 270 (1977). Since these statutes are jurisdictional and the ability to enter a judgment was at issue, the Court must at least indicate how it can enter a federal judgment awarding State of Washington unemployment taxes.

C. The holdings below conflict with this Court's decision in *Clackamas Gastroenterology v. Wells*, 538 U.S. 440 (2003) and/or decisions of the First, Second, Seventh and Eighth Circuits rejecting the per se rule automatically classifying a corporate officer as an employee regardless of the type of services performed.

The IRS stipulated Pet. App. 39a, that it was not relying on the common law factors to determine employee status. It relied only on the title of officer to find employee status.

Both courts approved the title only provision of 26 U.S.C. 3121(d)(1) stating that an officer is an employee. The decision fails to follow the IRS rulings that an officer who performs unrelated de minimus services of an officer "as such" is not an employee. 26 C.F.R.§ 31.3121(d)-1(b); (d)-1(a)(5). The IRS' own Rulings do not include services of licensed professionals as officer services. Rev. Rul. 58-505, 1958-2 CB 728. The regulation immediately preceding 26 C.F.R. § 31.3121 (d)-1(b), 26 C.F.R. § 31.3121(d)-1(a) states that an individual may be an employer but "his services" may not constitute employment. Titles of employers and employees automatically resulting in employer or employee classifications were rejected in this Court's ADA case of *Clackamas Gastroenterology v. Wells*, 538 U.S. 440, 450, 123 S.Ct. 673, 155 L. Ed 2d 615 (2003), where this court stated: "The mere fact that a person has a particular title—such as . . . vice president" . . . should not necessarily be used to determine whether he or she is an employee or proprietor." This Court in *Clackamas* clarified that titles are only one factor to consider in determining the conclusive factor. The conclusive factor is whether a professional person is controlled by anyone else. The word officer was inserted in 26 U.S.C. 3121 (d)(1) so that "superior" or supervising employees, if they otherwise qualified as employees, would not be excluded from a social security pension. *Deecy Products v. Welch*, 124 F.2d 592, 596 (1st Cir. 1941) refers to the Senate Committee Hearings on S. 1130, 74th Congress 1st Session (1934). At the hearings, the New York State Insurance Commissioner testified that high salaried white collar workers should be excluded but Senator Connelly disagreed stating that the president of a corporation as well as the doorkeeper should have the right to a social security pension.

The issue is correctly summarized in *Independent Petroleum v. Fly*, 141 F.2d 189, (a) (5th Cir. 1944) stating: "We think Congress intended by its definition that "employee" in the Act was not meant to exclude officers if they were really

employed by the corporation. Nominal officers such as honorary Vice Presidents and thus this Secretary, who do nothing and are paid nothing, were not intended to be made into employees throughout the Act." These holdings and comments are harmonious with the government's own treasury regulations of long standing. Treas. Reg. § 31.3121(d)-1(b) states:

> (b) **Corporate officers.** Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

State law, Wash. Rev. Code 18.100.065, does not require that all officers be licensed professionals. However, a professional corporation cannot practice the profession without a personally liable officer. Wash. Rev. Code 18.100.060; 18.100.070.

Petitioner, Western Management Inc., during the years in question, was a professional corporation, an entity not allowed in the State of Washington until 1969. Wash. Rev. Code 18.100.010. *Clackamas*, 438 U.S. at 447, notes that professional corporations were not allowed until the late 1950's and were popular in the 1970's. Here, the only worker in question is a "white collar" professional, a status not possible in 1934 when Congress inserted the word "officer". The government's own regulations rule out employee status for professionals who hold themselves out to serve the public. Treas. Reg. § 31.3121(d)-1(c)(2) is unequivocal and states that professionals, including attorneys who are in private practice who hold themselves out to

perform services for the public generally "are independent contractors and not employees".

All of the discussion of Congressional intent is unnecessary however, as no deficiency in employment tax can exist, even if a person is an employee, unless he is paid wages as an employee. 26 U.S.C. 3121(a) states: "remuneration for employment." Unlike income taxes, the payment of social security tax qualifies the individual for a government pension. A social security pension is denied those who form corporations, take the title of officer and attempt to qualify. The reason is that a payment cannot be wages unless the officers perform meaningful employee services as officers. *Joyce v Mathews*, 569 F.2d 1039, 1041 (8th Cir. 1978). *Joyce*, 569 F.2d at 1039, referred to the Social Security benefit provision, 42 U.S.C. 410 (j)(1), which mirrors 26 U.S.C. 3121(d)(1). The owners did not earn wages as officers and did nothing in that capacity. The case rejects the Social Security pension. If the payments do not earn a pension, the tax cannot be collected. 26 U.S.C. 3121(a)(1) requires contributions only to the maximum equal to section 230 of the Social Security Act. All the title 42 statutes are related to the title 26 subtitle, chapters 21, 22, 23.

Here, the Tax Court Judge referred to 26 U.S.C. 3121(d)(1) as a "statutory employee". This is a misnomer as the statutory employee definitions are included only in 26 U.S.C. 3121(d)(3)(A) through (D) i.e. agent driver, home worker, traveling or city salesmen. If an officer were a statutory employee, investment in facilities would exclude the person from being an employee. 26 U.S.C. 3121(d)(3), last paragraph.

Clackamas 538 U.S. at 442 was followed in *Solon v. Kaplan*, 398 F.3d 629, 632 (7th Cir. 2005). "Whether a shareholder director is an employee depends on all the incidents of the relationship." The case rejected titles as a criterion. The pre-*Clackamas* cases of *Clendenen v. Commis-*

sioner of Internal Revenue, 207 F.3d 1071 (8th Cir. 2000) (President of corporation served as both employee and independent contractor at same time; was not compensated as an officer). *Deecy Products v. Welch*, 124 F.2d 592 (1st Cir. 1941); *United States v. Griswold*, 124 F.2d 599 (1st Cir. 1941) (Trustees not under supervision and control) and *United States v. Bernstein*, 179 F.2d 105 (4th Cir. 1949) (Title of officer is not an employee per se). All reject employee classification if the officer did not furnish employee services and was not paid wages as an officer-employee. The act requires that services be employee services. *Independent Petroleum v. Fly*, 141 F.2d 189 (Fifth Cir. 1944) (No employee status, if only a nominal title of officer), also rejected the per se officer rule. These cases all construe 26 U.S.C. 3121 (d)(1), the employee-officer statute. *Solon v. Kaplan*, 398 F. 3d 629 (7th Cir. 2005), and *Clendenen* do not discuss 26 U.S.C. 3121 (d)(1), as it was not directly involved but nevertheless, rejected officer transmutation of independent contractor services to officer wages or employee classification.

Therefore, the First, Fourth, Fifth, Seventh and Eighth circuits conflict with this case. In actuality, the Ninth Circuit did not follow its own case rejecting officer titles. *United States v. Aberdeen Aerie*, 148 F.2d 655, 657(9th Cir. 1945) (per se officer status of physicians rejected-no way to control professional services).

The IRS stipulated that they were not relying on the common law employee independent contractor rules but wanted employee wages determine solely on the title "President" which was rarely used by the owner. The stipulation reduced the case to title only without regard to type of services performed.

A first impression issue of appellate construction of 26 U.S.C. 3121(c) is present as it requires that all the services of a worker be classified as independent contractor services if more than half the services performed during the pay period

are independent contractor services. This statute was enacted on August 10, 1939 (53 Stat. 1360, 1376) and has never been applied to a reclassification case. The only case that research could find interpreting the statute, *Inter-City Truck Lines L&D v. United States*, 408 F.2d 686, 687 (Ct. Cl. 1969) states that it was: "A device to ease administration where the same employee does two kinds of work for the same employer." The Tax Court in this case held that the statute did not apply if a person was an employee by title alone under 26 U.S.C. 3121(d)(1). Pet. App. 21a. The observation and holding is impossible as 26 U.S.C. 3121 (c) refers to "employee" without distinction or exception. The Court also cited no authority for its interpretation. The IRS's own interpretation is ample authority. 26 C.F.R. § 31.3121(c)-1(d) (example) states:

> **Example.** The AB Club, which is a local college club within the meaning of section 3121(b)(2), employs D, a student who is enrolled and is regularly attending classes at a university, to perform domestic service for the club and to keep the club's books. The domestic services performed by D for the AB Club do not constitute employment. D receives a payment at the end of each month for all services which he performs for the club. During a particular month D spends 60 hours in performing domestic service for the club and 40 hours as the club's bookkeeper. None of D's services during the month are deemed to be employment, since less than one-half of his services during the month constitutes employment.

The Courts below failed to review jurisdictional statutes and apply Supreme Court precedent. They created a conflict among Circuits. The decisions in this case reflect minimal judging denying due process to Petitioner. *Califano v. Wescott*, 443 U.S. 76, 88-9, 99 S.Ct. 2655, 61 L. Ed 2d 382 (1979).

CONCLUSION

The Appellate Court failed to follow the key requirements of exercise of control to determine employee status in order to award social security and unemployment tax judgments on employers. The Circuits are in conflict on law that should be uniform throughout the country. When a statute retroactively changes existing law to a pending case, the Court should be transparent in granting discovery to the affected litigant. Millions of small business owners need an answer to owner-worker classification that can be uniformly applied.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectively Submitted,

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June 30, 2006

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 12, 2006]

No. 04-70795
Tax Ct. No. 12686-99

WESTERN MANAGEMENT, INC.,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent-Appellee.

Appeal from a Decision of the
United States Tax Court
Maurice B. Foley, Tax Court Judge, Presiding

Argued and Submitted January 27, 2006
Seattle, Washington

MEMORANDUM*

Before: RAWLINSON, and CLIFTON, *Circuit Judges*, and MARSHALL,** *District Judge*.

Petitioner-Appellant, Western Management, Inc. ("Petitioner"), appeals the decision of the United States Tax Court,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

upholding Respondent Commissioner of Internal Revenues determination that Robert E. Kovacevich was an "employee" of Petitioner and, thus, that certain amounts paid to Kovacevich were "wages" subject to taxation under the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA"), as well as income tax withholding under 26 U.S.C. § 3402(a).

Based on the record before us, we conclude as follows:

1. The Tax Court did not clearly err in finding that Mr. Kovacevich was a "statutory employee" of Petitioner under 26 U.S.C. § 3121(d)(1). The services that Mr. Kovacevich performed for Petitioner are virtually analogous to those performed by the attorney/officer in *Van Camp & Bennion v. United States*, 251 F.3d 862, 866 (9th Cir. 2001), in that Kovacevich "exercised sole authority to make major corporate decisions" such as paying creditors, signing checks, signing the corporations Federal tax returns and drawing money from corporate accounts.

2. Mr. Kovacevich is not exempt from classification as an "employee" of Petitioner by virtue of the operation of 26 U.S.C. § 3121(c). As the Tax Court noted, that Section prevents an employees services (and wages derived therefrom) from triggering tax liability under the FICA if more than half of the services performed do not constitute "employment." "Employment" is broadly defined by 26 U.S.C. § 3121(b)(1) as "any service, of whatever nature, performed. . . by an employee for the person employing him." Clearly, the services performed by Mr. Kovacevich on behalf of Petitioner fell within this definition.

3. The mere fact that Mr. Kovacevich "had a substantial investment in the facilities used" in the performance of his services on behalf of Petitioner—i.e., that he personally owned all of the tangible assets of the law office—does not remove him from the statutory definition of "employee."

Based on the plain language of the statute, an individuals "substantial investment" in the facilities used for the performance of services operates to remove that individual from the definition of "employee" *only* if he or she is classified as an "employee" under subsection (d)(3) of 26 U.S.C. § 3121, not subsection (d)(1), as the Tax Court found and we uphold.

4. The payments made to Kovacevich by Petitioner were clearly payments for "services rendered" and, thus, indisputably constituted "wages" for the purposes of both the FICA and the FUTA. *See* 26 U.S.C. § 3401(a). Petitioner wrote checks to Mr. Kovacevich, his wife (Yvonne Kovacevich), and their creditors directly from its corporate account, the monies in which were derive entirely from Mr. Kovacevichs provision of legal services. Most significantly, Petitioner deducted these payments on its tax returns as "officer compensation."

5. Petitioner has waived, for the purposes of this appeal, the issue of whether Petitioner was otherwise relieved from tax liability (under both the FICA and FUTA) pursuant to Section 530 of the Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2885 (1978), as its briefs contain no mention of Section 530 or the relief it provides. *See, e.g., Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e review only issues which are argued specifically and distinctly in a partys opening brief.") (internal citation and quotations omitted).

6. The Tax Court did not err in adopting Respondents Rule 155 Calculations regarding the amount of "Social Security" (OASDI) tax assessed, as they were not in excess of the permissible wage base under 42 U.S.C. § 430.

7. The Tax Court did not err in adopting Respondents Rule *155* Calculations regarding the amount of FICA taxes owed, regardless of whether Kovacevichs paid self-employment taxes equivalent to the amounts owed. Congress has

provided a separate procedure by which an individual subsequently determined to be an "employee" of an outside entity may seek a credit or refund of self-employment taxes already paid. *See* 26 U.S.C. § 6511(d)(7). Under this provision, the employer (i.e., Petitioner) remains the liable party.

8. The Tax Court did not err in adopting Respondents Rule *155* Calculations regarding the amount of FUTA taxes owed. While 26 U.S.C. § 6201(b)(2) prohibits the Commissioner from assessing unpaid FUTA taxes on a *quarterly* basis, such an assessment is proper once the taxpayer has filed its annual return.

9. The Tax Court did not err in reopening the record subsequent to the passage of the Community Renewal Tax Relief Act of 2000 ("CRTRA"), Pub. L. 106-554 sec. 314(f), 114 Stat. 2763A-643 (2000). The Court's October 14, 1999 order dismissing Petitioners petition "insofar as it pertains to *amounts* of employment taxes and related additions to the tax" was not a "final" decision, because it was not dispositive of the entire case. Thus, the statute of limitations did not bar the Tax Court from reopening the record to determine the exact amount of taxes owed, pursuant to the retroactive conferral of jurisdiction under the CRTRA.

10. The Tax Courts denial of Petitioners June 21, 2001 discovery motion was clearly within its discretion, as the information sought to be discovered thereby—i.e., Tax Court members participation in the legislative process leading up to the passage of the CRTRA—was not relevant to any of the issues before it. *Accord River City Ranches #1 Ltd. v. Comm'r*, 401 F.3d 1136, 1139 (9th Cir. 2005) ("We will hold an order denying discovery to be an abuse of discretion only "upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.") (citation omitted).

11. The Tax Court did not err in granting Respondents motion, made at the 2002 trial, to incorporate the record from the trial of Robert E. and Yvonne Kovacevich in the related case of *Kovacevich v. Comm'r*, Tax Ct. No. 99-128 *15,* into the record in this case. Petitioner cites no authority in support of its argument and, as the Tax Court noted, it did not timely object below.

12. The Tax Court did not err in failing to shift the burden of proof on the issue of substantiation of the amount of the deficiencies owed from Petitioner to Respondent, pursuant to 26 U.S.C. § 7491(a)(1). That Section only applies to taxes imposed under subtitles A and B of the I.R.C.; the employment taxes at issue here are imposed under subtitle C.

13. The Tax Court did not err in failing to dismiss the case due to the inadequacy of the Notice of Determination itself. Pursuant to this Courts decision in *Scar v. Comm'r*, 814 F.2d 1363 (9th Cir. 1987), a deficiency notice will generally be valid if it considers "information that relates to a particular taxpayer," including information reported on the taxpayers returns. *Scar,* 814 F.2d at 1368. In this case, the Commissioner determined Petitioners employment tax deficiencies by referring to the amounts that Petitioner deducted as "officer compensation" on its 1994 and 1995 returns. Thus, consistent with *Scar,* the notice was adequate.

14. The final issue before the Court is whether, pursuant to 26 U.S.C. § 3402(d), Petitioner should not be held liable for income tax withholding, to the extent that the Kovacevich's paid personal income tax with respect to the wages at issue for the years in question. Respondent concedes that, to the extent that the Kovacevichs indeed paid income tax on the wages at issue, it cannot, under § 3402(d), collect withholding taxes on those same wages from Petitioner. However, the record contains no findings from the Tax Court concerning the applicability of § 3402(d), such that we cannot determine whether the Tax Court properly considered the issue in the

first instance. Based on the foregoing, we affirm the decision of the Tax Court in all respects except with regard to its calculations of the amount of income tax withholding owed under 26 U.S.C. § 3402(a). We remand to the Tax Court for consideration of the narrow issue of whether 26 U.S.C. § 3402(d) provides Petitioner with any relief from the collection of those taxes and, if so, for recalculation of the amounts owed. *Cf Estate of Cartwright v. Comm'r*, 183 F.3d 1034, 1038 (9th Cir. 1999).

AFFIRMED in part; REMANDED in part

Western Management v. CIR, Case No. 04-70795
Rawlinson, Circuit Judge, concurring:

I concur in the result.

APPENDIX B

Tax Court Memorandum Decision
Western Management, Inc.

Western Management, Inc. v. Commissioner.

Docket No. 12686-99. T.C. Memo. 2003-162.
Filed June 3, 2003.

[Code Sec. 3401][1]

Employment taxes: Employer-employee relationship: professional service corporation: Law firm employee,— An attorney who performed services for a corporation met the definition of a "statutory employee." The attorney served as the corporation's president and secretary-treasurer, worked in all aspects of the business, performed substantial services in his capacity as an officer and was paid for his services. Relief under Section 530 of the Revenue Act of 1978 was not available since the taxpayer failed to file appropriate returns, treated the attorney as an employee and did not have a reasonable basis to treat him as a nonemployee.

[Code Secs. 6656 and 6662]

Employment taxes: Negligence: Failure to withhold: Failure to deposit taxes.—A corporation was liable for the penalties for failure to deposit employment taxes and for underpayments of tax attributable to negligence. The taxpayer did not establish reasonable cause for failing to make the required deposits of tax. Moreover, the taxpayer's claim that its President was not an employee was meritless and it did not exercise due care in the filing of its return.

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[1] Unless otherwise indicated, all section references are to and all Rate references are to the Tax Court Rules of the Internal Revenue Code in effect for the years in issue, Practice and Procedure.

[Code Sec. 7436]

Employment taxes: Employer-employee relationship: Tax Court jurisdiction to determine employment status: Application of statute—Jurisdiction existed with respect to determining a professional services corporations liability for employment taxes based on its payment for services rendered by its sole attorney who was also its president. A decision to vacate a prior order partially granting the corporations motion to dismiss was not in error because, at the time a statutory amendment that adversely affected the taxpayer took effect, there was no final judgment in the case. Further, the notice of determination was not invalid for failure to explain adjustments. The taxpayer did not identify any reason to examine the IRSs motives or procedure leading to its determination. Lastly, the payment of FICA taxes in full by the attorney for one of the tax periods in question was irrelevant to the issue of whether the taxpayer had properly classified the attorney as an independent contractor or qualified under safe harbor provisions.

Robert E. Kovacevich and Richard W. Kochansky, for the petitioner. Milton B. Blouke and Roger P. Law, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

FOLEY, Judge: The petition in this case was filed in response to a Notice of Determination Concerning Worker Classification Under Section 7436 (notice of determination) relating to petitioner's liabilities, pursuant to the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), for 1994 and the first quarter of 1995 (period in issue). The issues for decision are whether: (1) Robert E. Kovacevich (Kovacevich) was petitioner's employee for Federal employment tax purposes, (2) petitioner is entitled to relief under section 530 of the Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2885, as amended (section

530), (3) petitioner owes employment taxes pursuant to sections 3111 and 3301, and (4) petitioner is liable for section 6656 and 6662(a) penalties.

FINDINGS OF FACT

On October 1, 1981, Kovacevich incorporated petitioner as Robert E. Kovacevich, P.S., a Washington C corporation, whose name was subsequently changed to Western Management, Inc. From its incorporation and through the period in issue, petitioner's only source of income was from the provision of legal services, and Kovacevich was petitioner's sole shareholder, president, and secretary-treasurer. In 1981, petitioners board of directors voted to pay Kovacevich $28,000 in 1982 and $60,000, annually, thereafter. Kovacevich designated the Seattle First National Bank, Spokane and Eastern Branch (Seafirst), as the depository for all of petitioner's funds. All moneys that were paid on petitioner's accounts receivable were deposited in the Seafirst account.

Kovacevich worked 160 to 180 hours per month for petitioner and performed all services necessary to generate gross receipts on behalf of petitioner, including: Paying creditors, hiring employees, signing checks, determining employee compensation, renewing petitioner's malpractice insurance, and signing petitioner's Federal tax returns. No other person performed legal services on behalf of petitioner.

Kovacevich received funds from petitioner as his needs arose and was not compensated for his services at predetermined intervals. In 1994 and the first quarter of 1995, respectively, petitioner paid Kovacevich $132,000 and $33,250. Petitioner issued checks to Kovacevich, his wife, and their creditors (e.g., Nordstrom, Teneff Jewelry, Fit and Hollywood!, and National Golf), and Kovacevich informed petitioner's accountant and tax return preparer, Bob Moe & Associates (Moe), that the payments were draws. Petitioner classified the payments as "loans" on its corporate ledgers

and did not file Forms 1099-MISC, Miscellaneous Income, relating to the payments. Petitioner also paid Kovacevich's law license renewal fees, office expenses, bar dues, and health insurance premiums and deducted most of these expenses on its corporate income tax returns.

Kovacevich and his wife (Kovacevichs) maintained, at Farmers and Merchants Bank, a personal line of credit. On the corporate ledgers, Moe listed the checks written to Farmers and Merchants Bank and MBNA in the "Receivable from Officer" account. These checks had an "LN" memo description, indicating that the payment related to a loan or the "Receivable from Officer" account.

From 1982 through 1992, petitioner sponsored a defined benefit plan for Kovacevich, its only participant. In 1982 and 1984, petitioner contributed $46,473 and $81,822, respectively, to the plan.

Petitioner's fiscal year ends on March 31. On its corporate income returns for 1994 and 1995, petitioner deducted officers compensation expenses in the amounts of $132,000 and $133,000, respectively. Kovacevich, in his capacity as president, amended petitioners 1991 Form 941, Employers Quarterly Federal Tax Return, with the following statement:

> The amount of earnings of Employee Robert E. Kovacevich was not clear, hence was left off. The Employee paid all Income Tax due, hence the withholding is unnecessary. However the Social Security Tax is due. A completed W-2(c) term is included.

On April 28, 1999, respondent sent petitioner a notice of determination, in which respondent determined that Kovacevich was an employee for Federal employment tax purposes and that petitioner was not entitled, pursuant to section 530, to relief from such classification. Enclosed with the notice of

determination was a schedule setting forth petitioners liabilities as follows:

Year	*Deficiency*	Addition to Tax *Sec. 6656*	Penalty *Sec. 6662*
1994	$48,968	$611	$9,794
1995	14,397	254	3,133

On September 21, 1999, the Court filed respondent's Motion To Dismiss In Part For Lack Of Jurisdiction And To Strike As To The Amounts Of Employment Taxes And Additions To Tax Proposed For Assessment By The Respondent (partial motion to dismiss). On October 12, 1999, the Court filed petitioner's response to the motion and granted the motion on October 14, 1999. On October 17, 2000, the Court filed petitioner's Motion To Dismiss For Lack Of Jurisdiction And Judgment On The Pleadings (motion to dismiss). On October 17 and 18, 2000, the Court held proceedings to determine whether petitioner properly classified Kovacevich as an independent contractor and whether petitioner is entitled to section 530 relief. On December 21, 2000, Congress amended section 7436(a) to provide this Court with jurisdiction to determine the correct amounts of Federal employment taxes in worker classification cases. See Community Renewal Tax Relief Act of 2000 (CRTRA), Pub. L. 106-554, sec. 314(f), 114 Stat. 2763A-643. That amendment was retroactive to August 5, 1997. CRTRA sec. 314(g), 114 Stat. 2763A-643. On February 8, 2001, the Court vacated its October 14, 1999, order of dismissal and denied respondents motion. On January 29, 2002, the Court held proceedings to determine the correct amount of employment taxes.

At the time the petition was filed, petitioners principal place of business was Spokane, Washington.

OPINION

I. *Jurisdiction*

Petitioner contends that this Court lacks jurisdiction to determine the correct amount of employment taxes because: section 7436 was amended after this Court granted respondents partial motion to dismiss, the notice of determination is invalid, and no employment tax is due.

A. *Our Decision To Vacate the October 14, 1999, Order Was Proper*

Petitioner contends that the Court improperly vacated its October 14, 1999, order, which granted respondents partial motion to dismiss. Petitioner, relying on *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), contends that the Constitutions separation of powers principles and the Due Process Clause of the Fifth Amendment prohibit the reopening of final judgments relating to section 7436 cases. Petitioner's reliance on *Plaut* is misplaced. In *Plaut*, the action was dismissed, and the judgment of dismissal became final prior to the enactment of the applicable statute. Specifically, the judgment of the District Court dismissing that case with prejudice was entered on August 13, 1991, was not appealed and became final 30 days later. Legislation purporting to authorize the reopening of that final judgment and the reinstatement of the complaint was signed into law by the President on December 19, 1991. The Supreme Court held that the retroactive legislation was unconstitutional to the extent it required Federal courts to reopen judgments that became final before its enactment. *Plaut v. Spendthrift Farm, supra.*

Plaut is distinguishable because the amendment to section 7436 does not require the reopening of judgments which had become final prior to the amendments enactment. Cf. *Plaut v. Spendthrift Farm, supra* at 214-217. Vacating the order was within our authority and consistent with the amendment and its effective date. See sec. 7436(a). Moreover, our judgment in this case is not yet final. See sec. 7481(a); Rule 190(a).

Consequently, *Plaut* is inapplicable. Accordingly, this Court's decision to vacate its October 14, 1999, order was proper. *Neely v. Commissioner*, 116 T.C. 79, 84 n.6 (2001).

B. *Notice of Determination*

Petitioner contends that the notice of determination is invalid because "the unexplained arrows and rounding of * [the amounts used to determine the deficiencies indicate vagueness." Challenges regarding the validity of a notice of determination are analogous to such challenges to a notice of deficiency. *Henry Randolph Consulting v. Commissioner*, 113 T.C. 250 (1999) (holding that a notice of determination was not invalid for failure to specify the names of the individuals whose status had been determined pursuant to section 7436). A notice of deficiency is not "invalid for failure to explain the adjustments, failure to cite statutory provisions on which respondent relied, or inconsistencies in the notice lof deficiency." *Id.* at 253; *Campbell v. Commissioner*, 90 T.C. 110 (1988); *Mayerson v. Commissioner*, 47 T.C. 340, 348-349 (1966). There is no dispute that the name of the taxpayer, the affected tax periods, and the amounts of the deficiencies are set forth in the notice of determination. Generally, the Court will not examine respondent's motives or procedure leading to his determination relating to a notice of deficiency. See *Riland v. Commissioner*, 79 T.C. 185, 201 (1982); *Greenbergs Express. Inc. v. Commissioner*, 62 T.C. 324, 327 (1974). Similarly, petitioner has not identified any reason to examine respondent's motives or procedure leading to his determination pursuant to section 7436.

C. *Kovacevichs' 1994 FICA Tax Payment*

On October 17, 2000, the Court filed petitioner's motion to dismiss on the ground that the Court lacks jurisdiction because the Kovacevichs allegedly paid all of their 1994 FICA taxes. Our jurisdiction, pursuant to section 7436, is based upon whether petitioner properly classified Kovacevich as an

independent contractor and whether petitioner is entitled to section 530 relief. *Henry Randolph Consulting v. Commissioner, supra.* In addition, we have jurisdiction to determine petitioners employment tax liability relating to amounts petitioner paid Kovacevich in 1994 and 1995. Sec. 7436(a). Therefore, petitioners motion to dismiss will be denied.

II. *Employment Status*

Sections 3111 and 3301 impose taxes on employers under FICA and FUTA, respectively, based on wages paid to employees. "Employee" is defined for purposes of the FICA tax in section 3121(d). With certain modifications not germane here, this definition applies for purposes of the FUTA tax as well. Sec. 3306(1). Pursuant to section 3121(d)(2), the term "employee" includes any individual who has the status of an employee under the common law. Paragraphs (1), (3). and (4) of section 3121(d) delineate "statutory employees". These individuals are considered employees regardless of their status under the common law rules. See *Joseph M. Grey Pub. Accountant, P.C. v. Commissioner*, 119 T.C. 121, 126 (2002). Any officer of a corporation is a statutory employee, if such officer performs substantial services for a corporation and receives remuneration for those services. See *Veterinary Surgical Consultants, P.C. v. Commissioner*, 117 T.C. 141 (2001), affd. sub nom. *Yeagle Drywall Co. v. Commissioner*, 54 Fed. Appx. 100 (3d Cir. 2002); sec. 3121(d)(1) sec. 31.3121(d)-1(b), Employment Tax Regs. Kovacevich was a statutory employee because at all relevant times he served as petitioner's president and secretary-treasurer, worked in all significant aspects of petitioner's business, performed substantial services for petitioner in his capacity as an officer, and obtained remuneration for such services from petitioner as his needs arose.[2]

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[2] Petitioner contends that the Courts determination of whether Kovacevich is an employee or independent contractor is controlled by *Clackamas*

III. *Section 530 of the Revenue Act of 1978*

Section 530 provides relief from employment tax liability, notwithstanding the actual relationship between the taxpayer and the individual performing services. Sec. 530(a). The taxpayer, however, must establish: It did not treat the worker as an employee, filed all returns for periods after December 31, 1978, "on a basis consistent with the taxpayers treatment of such * * * [worker] as not being an employee", and had a reasonable basis for not treating the worker as an employee. Sec.530(a)(1) and (2); *Joseph M. Grey Pub. Accountant, P.C. v. Commissioner, supra* at 123.

Petitioner treated Kovacevich as an employee. Sec. 530(a)(1)(A), Petitioners board of directors voted to pay Kovacevich a $60,000 salary and issued a Form W-2, Wage and Tax Statement, relating to 1991. In addition, Kovacevich, in his capacity as petitioners president, filed an amended Form 941 for 1991, with the following statement:

> The amount of earnings of *Employee* Robert E. Kovacevich was not clear, hence was left off. The *Employee* paid all Income Tax clue, hence the withholding is unnecessary. However the Social Security Tax is due. A completed W-2(c) term is included. [Emphasis added]

Furthermore, petitioner did not file Forms 1099 relating to payments made to Kovacevich. Sec. 530(a)(1)(B). Thus, petitioner fails the first two requirements and, accordingly, is not entitled to relief.

Gastroenterology Associates, P.C. v. Wells, 536 U.S.—, 123 S. Ct. 1673 (Apr. 22, 2003). We disagree. In *Clackamas*, the Court simply held that in determining whether four director-shareholder physician., were employees or employers for purposes of the Americans with Disabilities Act of 1990, "the common law element of control is the principal guidepost". The Court did not consider whether these individuals were employees or independent contractors for FICA and FUTA purpose. For employment tax purposes, Kovacevich is a statutory employee pursuant to sec. 3121(d)(1), and we need not resort to the common—law principles considered in *Clackamas*.

IV. *Liability for Employment Tax*

Petitioner paid Kovacevich $132,000 and $33,250 in wages during 1994 and the first quarter of 1995, respectively. Because we have determined that Kovacevich is an employee under sections 3121(d)(2) and 3306(i), petitioner is liable for FICA and FUTA taxes as determined by respondent. See secs.3306(a)(1) and (h), 3111(a) and (b).

V. *Penalties Under Sections 6656 and 6662a)*

Section 6656 imposes a penalty equal to 10 percent of the portion of an underpayment in tax that is required to be deposited if the failure to deposit is more than 15 days beyond the prescribed deadline. See sec. 6656(a); secs. 31.3402(b)-1, 31.3402(c)-1, Employment Tax Regs. Petitioner has not established reasonable cause for failing to make the required deposits of tax. Therefore, we sustain respondents determination. See *Van Camp & Bennion v. United States*, 251 F.3d 862 (9th Cir. 2001).

Section 6662(a) imposes an accuracy-related penalty equal to 20 percent of the portion of an underpayment that is attributable to negligence. Petitioner's contention that amount, paid to Kovacevich were not wages is meritless. See *Van Camp & Bennion v. United Slates, supra* at 869 (stating that the reasonable basis standard is not satisfied by "a return position that is merely arguable or that is merely a arguable claim"); *Spicer Accounting Inc v United States*, 918 F.2d 90 (9th Cir. 1990). Petitioner did not exercise due care in the filing of its return and thus is liable for the section 6662(a) penalty. Therefore, we sustain respondents determination.

Contentions we have not addressed are irrelevant, moot, or meritless, to reflect the foregoing,

An order denying petitioner's motion to dismiss will be issued, and decision will he entered under Rule 155.

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 12686-99

WESTERN MANAGEMENT, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

This case is before the Court on petitioner's Motion to Reconsider Opinion pursuant to Rule 161.1

On June 3, 2003, this Court issued its Memorandum Findings of Fact and Opinion in *Western Management, Inc. v. Commissioner*, T.C. Memo. 2003-162 (Western), which concluded that Robert E. Kovacevich was petitioners employee for Federal employment tax purposes; petitioner was not entitled to relief under section 530 of the Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2885, as amended; petitioner owed employment taxes pursuant to sections 3111 and 3301; and petitioner was liable for section 6656 and 6662 (a) penalties.

On June 30, 2003, the Court filed petitioner's Motion to Reconsider Opinion, and on July 1, 2003, the Court filed petitioners Supplement to Motion to Reconsider Opinion. On July 24, 2003, the Court filed respondent's Notice of Objection to Petitioners Motion to Reconsider Opinion as Supplemented.

Reconsideration under Rule 161 permits us to correct manifest errors of law or fact, or to allow newly discovered evidence to be introduced that could not have been introduced before the filing of an opinion, even if the moving party had exercised due diligence. See *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987); see also *Traum v. Commissioner*, 237 F.2d 277, 281 (7th Cir. 1956), affg. T.C. Memo 1955-127. The granting of a motion for reconsideration rests within the discretion of the Court. See *Alexander v. Commissioner*, 95 T.C. 467, 469 (1990); *Vaughn v. Commissioner*, 87 T.C. 164, 166-167 (1986).

Our opinion in Western was correctly decided. For sake of completeness, however, we address petitioner's contentions which include: (1) The Courts finding of facts are not supported by the record; (2) the notice of determination was invalid because the period of limitations for assessment had expired after the deficiency portion was dismissed in 1999; (3) the dual capacity doctrine applies to reduce the amount of wages that Kovacevich received from petitioner; (4) section 3121(c) excludes all of Kovacevichs services from being characterized as "employment"; (5) section 31.3121(d)-l(c)(2) classifies Kovacevich as an independent contractor; (6) petitioner was only a conduit of funds and not Kovacevichs employer; and (7) the Court committed various procedural errors, which violated petitioner's due process rights.

I. *Courts Findings of Fact Are Supported by the Record*

Petitioner contends that a number of the Courts findings of fact are not supported by the record. We disagree and find that petitioners contentions are frivolous and meritless. We further note that Kovacevichs testimony was inconsistent and not credible. For example, petitioner states that it did not have a bank account, Kovacevich did not sign any documents as president, and it did not issue any shares of stock to Kovacevich. The record clearly establishes that petitioner had a bank account (i.e., Kovacevich admitted that all of peti-

tioners income was deposited into an account at Seattle First National Bank, Spokane and Eastern Branch), and Kovacevich signed various government documents (e.g., petitioner's corporate and employment tax returns) under penalties of perjury as president. In addition, as reflected in the minutes of petitioners first board of directors meeting, petitioner issued 6,000 shares of stock to Kovacevich in return for $496 in cash, the goodwill of his law practice, costs advanced, accounts receivable, stationery, and supplies. Accordingly, we reject petitioners contentions.

II. *Period of Limitations Had Not Expired*

Petitioner contends that the period of limitations relating to the assessment had expired prior to February 8, 2001, the date the Court vacated its October 14, 1999, order, dismissing the deficiency portion of the case. Petitioner further contends, relying on *Stogner v. United States*, 123 S.Ct. 2446 (2003), that the amendment to section 7436 cannot revive a time-barred claim. Petitioner's reliance on *Stogner* is misplaced.

In *Stogner*, an amendment to a California statute extended the statute of limitations relating to the prosecution of sex-related child abuse cases where the prior limitations period had expired if, for example, the prosecution had begun within 1 year of a victims report to police. This amendment resurrected otherwise time-barred criminal prosecutions and was enacted after the pre-existing statute of limitations had expired relating to the defendants alleged offenses.

Contrary to *Stogner*, the amendment to section 7436 does not require the reopening of judgments which had become final prior to the amendments enactment. Cf. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 214-218 (1995) (holding that retroactive legislation was unconstitutional where such legislation required Federal courts to reopen judgments that became final before the legislations date of enactment). Moreover, the judgment in this case was not yet final on

February 8, 2001, when the Court vacated its October 14, 1999, order. See *Neely v. Commissioner*, 116 T.C. 79, 84 n.6 (2001).

Forms 4340 indicate that the period of limitations was extended to December 31, 1999. See *Koff v. United States*, 3 F.3d 1297, 1298 (9th Cir. 1993) (stating that Forms 4340 are "probative evidence that an assessment was properly made); see also *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993)—Petitioner did not provide any credible testimony or other evidence to refute respondent's documentary evidence. The Court filed the petition in this case on July 19, 1999. As of that date, the period of limitations relating to the assessment had not yet expired and was suspended until the Courts judgment became final. Sec. 6503(a). Therefore, we reject petitioner's contention.

III. *The Dual Status Doctrine Does Not Reduce the Amount of Wages Kovacevich Received From Petitioner*

The Court recognizes that the tax consequences are different when an individual has dual roles in a corporation—such as that of secretary of the corporation and that of a lawyer for the corporation. See *Idaho Ambucare Ctr., Inc. v. United States*, 57 F.3d 752, 757 (9th Cir. 1995) (stating that where there is an "attorney in private law practice who serves as secretary of a corporation and also performs legal services * * * [a] distinction can be drawn between the attorneys "official functions—which may be nominal, thus rendering the attorney outside the parameters of [section] 3121(d)(1)—and his duties as corporate outside counsel.") The duties, however, that Kovacevich performed and the remuneration he received from petitioner cannot be divided into separate and distinct roles. *Western Management, Inc. v. United States*, 45 Fed. Cl. 543, 552 (2000)

Kovacevich made the ultimate management and financial decisions for petitioner. For this work, Kovacevich drew

money from petitioner to pay for his professional and personal expenses. Clearly, Kovacevichs duties and remuneration as an "officer" of petitioner and as an attorney were interrelated and intermingled. *Id.* Conceivably, Kovacevich could have set up his relationship with petitioner in such a way as to establish a dual capacity. The record, however, does not support petitioners contention. Therefore, we reject petitioners contention.

IV. *Section 3121(c) Is Not Applicable*

Petitioner contends that all of Kovacevich's services performed on behalf of petitioner are excluded pursuant to section 3121(c) because more than half of Kovacevich's services were legal services. Section 3121(c) excludes an employees services from the definition of "employment" for purposes of section 3121, if more than half of the services performed do not constitute "employment". Because the Court found that Kovacevich is a statutory employee pursuant to section 3121 (d) (1) , *Van Camp & Bennion v. United States*, 251 F.3d 862, 865-866 (9th Cir. 2001), and his services as an attorney and officer cannot be divided into separate and distinct roles, section 3121(c) does not apply to exclude Kovacevichs legal services.

V. *Section 31.3121(d) -1 (c) (2) Is Not Applicable*

Petitioner contends that section 31.3121(d)-(l) (c) (2) precludes Kovacevich from being classified as an employee because professionals (e.g., attorneys) are classified as independent contractors. Petitioner's reliance on section 31.3121(d)-(1) (c) (2) is misplaced. Section 31.3121(d)-1 (c) (2) states:

> An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as * * * attorneys * * * engaged in the pursuit of an independent trade, business, or profession, in which they offer their

> services to the public, are independent contractors and not employees."

Section 31.3121(d)-1(c) (2) pertains to common law employees, not statutory employees. Because we concluded that Kovacevich was a statutory employee under section 3121(d) (1) in Western, *Van Camp & Bennion v. United States, supra* at 866, the Court does not reach the issue of whether Kovacevich was also a common law employee. Therefore, section 31.3121(d)-(1) (c) (2) is inapplicable.

VI. *Petitioner Was Not a Mere Conduit of Funds*

Petitioner contends, relying on *Marlar, Inc. v. United States*, 151 F.3d 962 (9th Cir. 1998), that it was merely a conduit of funds and not Kovacevichs employer. Petitioners reliance on *Marlar* is misplaced. In *Marlar*, a taxpayer ran an adult entertainment establishment in which each dancer was treated as a lessee and required to sign a "Dancer Performance Lease" under which the taxpayer provided stages and dance facilities in exchange for a rental fee. Dancers received compensation in the form of cash from customers, company issued "bucks" exchanged for cash, and rent credit for each drink purchased for them by customers. The dancers did not report their earnings to the taxpayer and payments were not deducted on the taxpayers corporate income tax return. The court held that payments made in exchange for "bucks" and rent credits did not constitute "wages" because the taxpayer served merely as conduit of funds when it transferred to the dancers account money received from the dancers customers.

Contrary to Marlar, Kovacevich's legal bills were sent out under petitioners name; fees collected in exchange for services were deposited into petitioners account; and payments were made from petitioner's account to creditors, Kovacevich, and other recognized employees of petitioner. All of these payments were then deducted by petitioner on its cor-

porate tax return. In such circumstances, petitioner was more than a mere conduit of funds.

VII. *The Court Did Not Violate Petitioner's Due Process Rights*

Petitioner contends that the Court: (1) Erred in granting respondents April 2, 2001, motion to incorporate the record from the trial of Robert E. and Yvonne Kovacevich; (2) engaged in ex parte discussion with respondents counsel, disparagement of witnesses, and other procedural errors during the January 28, 2002, trial; (3) erred in denying petitioner's various discovery requests and motions; (4) refused to conduct a meaningful pretrial hearing; and (5) erred in denying petitioners motion to certify an interlocutory appeal.

At the 2002 trial, respondent asked the Court to grant his motion to incorporate the record from the trial of Robert E. and Yvonne Kovacevich. Petitioner did not object, and the Court granted respondent's motion on January 28, 2002. Because petitioner failed to timely object to the admission of these items it has waived any objection. Fed. R. Evid. 103 (a) (1) *United States v. Jamerson*, 549 F.2d 1263, 1266-1267 (9th Cir. 1977).

Petitioner further contends that the Court engaged in ex parte discussion with respondents counsel during calendar call on January 28, 2002. As reflected in the transcript, the Court called the case to request the parties stipulation of facts. Petitioner's counsel failed to appear, and the Court ordered respondent's counsel to meet with petitioners counsel to complete the stipulation of facts. Thus, no off-the-record or ex parte discussion between the Court and respondents counsel has occurred. *Earnshaw v. Commissioner*, T.C. Memo. 2002-191.

Petitioner also contends that the Court erred in denying petitioners various discovery requests (e.g., petitioners discovery request No. 29, filed May 2, 2001) and motions (e.g.,

summary judgment motion dated August 13, 2001), refusing to conduct a meaningful pretrial hearing, and refusing to allow petitioner's motion to certify an interlocutory appeal. Petitioner has not established that its rights were violated or that any purported violation resulted in a substantial error material to the outcome of this case. See *Arizona v. Fulminante*, 499 U.S. 279, 306-312 (1991). Petitioner's due process rights were not violated.

The remaining contentions raised in petitioner's motion are without merit. Upon due consideration and for cause it is hereby

ORDERED that petitioner's Motion to Reconsider Opinion, filed on June 30, 2003, as supplemented, July 1, 2003, is granted. It is further

ORDERED that the Courts opinion in *Western Management, Inc. v. Commissioner*, T.C. Memo. 2003-162, filed on June 3, 2003, remains unchanged and in full force and effect.

/s/ Maurice B. Foley
Judge

Dated: Washington, D.C.
August 20, 2003

APPENDIX D

UNITED STATES TAX COURT

[Filed Jun. 27, 2001]

Docket No. 12686-99
EMPLOYMENT

WESTERN MANAGEMENT, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION TO COMPEL RESPONDENT'S RESPONSE TO PETITIONER'S SECOND SET OF INTERROGATORIES AND TO IMPOSE SANCTIONS

THE PETITIONER MOVES, pursuant to the provisions of Rules 71(c) and 104 (b) of the Court's Rules of Practice and Procedure, that the Court enter an order compelling the Respondent, within 10 days of this Court's Order, to answer in good faith, and as completely as Respondent's information shall permit, the specified interrogatories served on Respondent on May 2, 2001.

PETITIONER FURTHER MOVES, pursuant to the provisions of Rule 104 (c) of the Court's Rules of Practice and Procedure, that the Court order, on failure of the Respondent to completely comply with the Court's order compelling Respondent to answer in good faith, and as completely as Respondent's information permits, each of Petitioner's Second Set of Interrogatories listed herein that this Court preclude Respondent from introducing evidence relating to those interrogatories not properly answered.

ANSWER: Respondent objects to this question on the grounds that it is not relevant "to the subject matter" within the meaning of Tax Court Rule 70(b)(1) because it is not information that "appears reasonably calculated to lead to discovery of admissible evidence."

ARGUMENT: Petitioner needs this information to calculate the overpayment of employment taxes. The Commissioner's regulations indicate that employment tax overpayments may be carried forward. Case law allows continuing carry forwards. The objection of relevancy is totally non responsive as the determination of tax liability is the subject of this proceeding. Respondent can easily answer this question yes or no but attempts to evade a critical answer.

Interrogatories 29 and 30 are considered together.

Interrogatory No. 29 proposed by Petitioner was:

> *INTERROGATORY NO. 29*: Please list, identify or otherwise indicate any and all documents or information of any kind or type in possession of any office of the Internal Revenue Service or the United States Department of Justice, Court of Federal Claims or any department or division of Department of Justice that will lead to relevant evidence of the participation in any way with the United States Tax Court or any member of Congress that participated or was in any way involved or affiliated in any way with the amendment of 26 U.S.C. 7436 in December of 2000.

Respondent's Answer was:

> *ANSWER*: The legislative process of the enactment of bills in the congress cannot be challenged in this proceeding and therefore the information requested is not relevant "to the subject matter" within the meaning of Tax Court Rule 70(b)(1) because it is not information

that "appears reasonably calculated to lead to discovery of admissible evidence."

Interrogatory No. 30 proposed by Petitioner was:

> *INTERROGATORY NO. 30*: Please list, identify, or otherwise indicate all contacts made in any way with the Tax Court personnel or members of Congress concerning any discussion of the amendment to 26 U.S.C. 7436 in December of 2000.

Respondent's Answer was:

> *ANSWER*: The legislative process of the enactment of bills in the Congress cannot be challenged in this proceeding and therefore the information requested is not relevant "to the subject matter" within the meaning of Tax Court Rule 70(b)(1) because it is not information that "appears reasonably calculated to lead to discovery of admissible evidence."

ARGUMENT: . . . Petitioner's case may have been specifically discussed by Respondent and the Court's personnel. . . . The legislation occurred during the time this case was pending. This unique circumstance requires total disclosure as it is a case of first impression. . . . Petitioner is entitled to determine ex parte communication between the Tax Court personnel and Respondent, if any, about this actual case that may violate Petitioner's due process rights.

APPENDIX E

UNITED STATES TAX COURT

[Filed Aug. 1, 2001]

Docket No. 12686-99
Employment

WESTERN MANAGEMENT, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RESPONDENT'S OBJECTIONS TO PETITIONER'S MOTION TO COMPEL RESPONDENT'S RESPONSE TO PETITIONER'S SECOND SET OF INTERROGATORIES AND TO IMPOSE SANCTIONS

Pursuant to Tax Court Rule 71, respondent objects to petitioner's Motion to Compel respondent's response to petitioner's second set of interrogatories and to impose sanctions.

In SUPPORT THEREOF, Respondent respectfully shows unto the Court:

1. The issues remaining before the Court for trial on October 1, 2001 consist of the following:

a. Whether $33,000 of the $132,000 deducted by the petitioner as "CONTRACT LABOR-OFFICER" in fiscal year ended March 31, 1994 were wages paid to ROBERT KOVACEVICH that are subject to employment taxes during the first quarter of 1994;

b. Whether the $133,000 deducted by the petitioner as "CONTRACT LABOR-OFFICER" in fiscal year ended March 31, 1995 were wages paid to ROBERT

KOVACEVICH that are subject to employment taxes during the calendar year 1994 and the first quarter of 1995;

14. With respect to the Interrogatory number 28, respondent believed petitioner was inquiring about records maintained by the Social Security Administration that are not in respondent's possession nor are relevant to this case. Respondent now believes that petitioner is seeking information on how payments were credited to petitioner's tax accounts. The transcripts provided for the quarters from March 31, 1988 through March 31, 1995 show how the payments were applied. Also responses to interrogatory number 25 and 27 as supplemented by this response.

15. With respect to the Interrogatory number 29, respondent continues to object on the grounds that the legislative process of the enactment of bills in the Congress can not be challenged in this proceeding and therefore the information requested is not relevant "to the subject matter" within the meaning of Tax Court Rule 70(b) (1) because it is not information that "appears reasonably calculated to lead to discovery of admissible evidence."

16. With respect to the Interrogatory number 30, respondent continues to object on the grounds that the legislative process of the enactment of bills in the Congress can not be challenged in this proceeding and therefore the information requested is not relevant "to the subject matter" within the meaning of Tax Court Rule 70 (b)(1) because it is not information that "appears reasonably calculated to lead to discovery of admissible evidence."

Respondent further answers that there was no "ex parte communication" between Tax Court personnel and respondent about this case at all.

APPENDIX F

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 1286-99
Employment

WESTERN MANAGEMENT, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

The Court heard this case at its October 17, and 18, 2000 trial session, and has set it for further trial at an October 1, 2001, special session, Los Angeles, California. The case is now before the Court on petitioner's Motion to Compel Respondent's Response to Petitioner's Second Set of Interrogatories and to Impose Sanctions, filed June 27, 2001, and respondent's Objections to Petitioner's Motion to Compel Respondent's Response to Petitioner's Second Set of Interrogatories and to Impose Sanctions, file August 1, 2001.

In his objection, respondent has supplemented his response, such that petitioner's contentions are now moot. Accordingly, it hereby is

ORDERED that petitioner's Motion to Compel Respondent's Response to Petitioner's Second Set of Interrogatories and to Impose Sanctions, filed June 27, 2001, hereby is denied as moot.

/s/ Maurice B. Foley
Judge

Dated: Washington, D.C.
August 8, 2001

APPENDIX G

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 12686-99
Employment

WESTERN MANAGEMENT, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

On September 21, 1999, respondent filed a Motion to Dismiss in part for lack of Jurisdiction and to Strike as to the Amounts of Employment Taxes and Additions to Tax Proposed for Assessment by the Respondent. On October 12, 1999, petitioner filed a Response to respondent's motion.

This Court does not have jurisdiction to decide the amount of employment tax or income tax withholding liability in an action for redetermination of employment status under Internal Revenue Code section 7436. *Henry Randolph Consulting v. Commissioner*, 112 T.C. No. 1 (January 6, 1999). Accordingly, it is

ORDERED that respondent's motion filed September 21, 1999, is granted, this case is dismissed for lack of jurisdiction insofar as it pertains to amounts of employment taxes and related additions to the tax, and references to such amounts in the petition are deemed stricken.

/s/ Mary Ann Cohen
Chief Judge

Dated: Washington, D.C. October 14, 1999

APPENDIX H

Western Management, Inc.
EIN: 91-1151845
Tax Years 1994 and 1995

Explanation of Adjustments

Reclassification of Workers Under Section 7436

It is determined that. for the taxable years 1994 and 1995 Robert E. Kovacevich is an employee rather than an independent contractor as claimed. It has not been shown that Mr. Kovacevich, pursuant to Sections 3121(d), 3306(i) and, 3401(c) of the Internal Revenue Code, and the twenty common law factors of Revenue Ruling 87-41, is anything other than an employee. Accordingly, you are subject to F.I.C.A. tax, F.U.T.A. tax and Federal income tax withholding on the earnings of Mr. Kovacevich.

Western Management, Inc.
EIN: 91-1151845
Tax Years 1994 and 1995

Exhibit A

Schedule of wages paid to Robert Kovacevich, subject to employment taxes

Employee Name and SSN	Type of Wages	Quarter Ended 03/31/94	Quarter Ended 06/30/94	Quarter Ended 09/30/94	Quarter Ended 12/31/94	Yearly Totals
Kovacevich, Robert E.	FUTA	$7,000	$0 -	$0	$0	$7,000
531-32-7726	Soc Sec	$33,000	$27,600	$0	$0	$60,600
	Medicare	$33,000	$33,250	$33,250	$33,250	$132,750
	Withholding	$33,000	$33,250	$33,250	$33,250	$132,750

Employee Name and SSN	Type of Wages	Quarter Ended 03/31/95	Yearly Totals
Kovacevich, Robert E.	FUTA	$0	$0
531-32-7726	Soc Sec	$33,250	$33,250
	Medicare	$33,250	$33,250
	Withholding	$33,250	$33,250

Form 2504 (Rev. March 1993)	Department of the Treasury - Internal Revenue Service **Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment** (Excise or Employment Tax)	Date received by Internal Revenue Service AP-FWH-FCH-CP

Name, address, and employer identification number as it appears on the return

Western Management, Inc.
Formerly Robert E. Kovacevich P.S.
4603 S. Pittsburg
Spokane, WA 99223-6453

EIN:91-1151845

Additional Tax and Penalties

Tax Period Ended	Return Form Number	Kind of Tax and Internal Revenue Code Section	Amount of Tax	Penalty
1994	940	FUTA Tax - Sec 3301	3434.00	$130.00
01/01/94 - 12/31/94	941	FICA & W/H Sec 3101 3111 3402 6672	$52,626.15	$11,298.04
04/01/95 - 06/30/95	941	FICA & W/H Sec 3101 3111 3402 6672	$14,397.25	$3,133.91
		Total	$67,457.40	$14,561.85

Decrease in Tax and Penalties

Tax Period Ended	Return Form Number	Kind of Tax and Internal Revenue Code Section	Amount of Tax	Penalty
		Total	$0.00	$0.00

I consent to the immediate assessment and collection of any additional tax and penalties and accept any overassessment (decrease in tax and penalties) shown above, plus any interest provided by law

Signature	▸Western Management, Inc.		Date
	▸		Date
	▸ By:	Title▸	Date

Note: If you consent to the assessment of the amounts shown in this agreement, your signature will expedite our adjustment to your account. Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are entitled to a refund. It will not prevent us from later determining, if necessary, that you owe additional tax; nor extend the time provided by law for either action.

Who Must Sign

If you are making this agreement for a partnership, all partners must sign. However, one partner may sign with appropriate evidence of authorization to act for the partnership.

For a corporation, enter the name of the corporation followed by the signature and title of the officer(s) authorized to sign.

For an agent or attorney acting under a power of attorney, a power of attorney must be sent with this form if not previously filed.

Western Management, Inc.
EIN: 91-1151845
Tax Years 1994 and 1995

Additional Statements

Failure to Deposit, IRC Section 6656

Since you failed to make timely deposits of Federal FUTA and FICA *taxes* as required by law, the addition to the tax provided by section 6656 of the Internal Revenue Code is charged for the taxable years 1994 and 1995.

Negligence, IRC Section 6662(a)

All of the underpayment of tax for the taxable years 1994 and 1995 is due to negligence or disregard of rules or regulations and you have not established that such underpayment of tax was due to reasonable cause. Consequently, there shall be added to the tax an amount equal to 20 percent of such underpayment under Section 6662(a) of the Internal Revenue Code.

Form 4666 | Department of the Treasury - Internal Revenue Service
SUMMARY OF EMPLOYMENT TAX EXAMINATION

Name and address of employer

Western Management, Inc.
4603 S. Pittsburg
Spokane, WA 99223-6453

Employer identification number: 91-1151845
Date of report: 10/08/1998
Type of Report (___) Delinquent tax (return not filed)
(_X_) Increase (decrease) in tax (return filed)
(____) Agreed
(_X__) Unagreed

Following is a summary of the examination of your returns as shown on the attached pages of this report.

a	b	c	d		e	f
Calendar Year	Return Form Number	Delinquent Tax Increase (Decrease)	Penalty		Total Tax and Penalty	Page Number of Report
			Code Section	Amount		
1994	940	$434.00	6656 & 6662(a)	$130.00	$564.00	2
1/1/94 - 12/31/94	941	$52,626.15	6656 & 6662(a)	$11,298.04	$63,924.19	3
1/1/95 - 3/31/95	941	$14,397.25	6656 & 6662(a)	$3,133.81	$17,531.06	4
Total		$67,457.40		$14,561.85	$82,019.25	

Other Information

This does not constitute an income tax examination.

Western Management, Inc.
EIN: 91-1151845
Tax Years 1994 and 1995

Exhibit C

Computation of Negligence Penalty, IRC Section 6662(a)

FUTA Tax Penalty:	1994
Deficiency in FUTA Tax	$434
Penalty Rate	20%
Penalty Rate	$87

FICA Tax Penalty:	03/31/94	06/30/94	09/30/94	12/31/94	3/31/95
Total FICA Tax Deficiency	$5,049.00	$5,087.25	$4,355.65	$964.25	$5,087.25
Total Withholding Tax	$9,240.00	$9,310.00	$9,310.00	$9,310.00	$9,310.00
Amount Subject to Penalty	$14,289.00	$14,397.25	$13,665.65	$10,274.25	$14,397.25
Penalty Rate	20%	20%	20%	20%	20%
Penalty Amount	$2,857.80	$2,879.45	$2,733.13	$2,054.85	$2,879.45

Form 4667	Department of the Treasury - Internal Revenue Service EXAMINATION CHANGES - FEDERAL UNEMPLOYMENT TAX	Calendar Year 1994

Name and address of employer:	Employer Identification Number:	Date of Report
Western Management, Inc. 4603 S. Pittsburg Spokane, WA 99223-6453	91-1151845	10/09/1998

Type of Report: Delinquent tax (return not filed)
Increase (decrease) in tax (return filed)
( ) Agreed (X) Unagreed

1. Total taxable wages as reported or as previously corrected	$26,050
2. Increase (decrease) in taxable wages	$7,000
3. Corrected total taxable wages	$33,050
4. Gross Federal unemployment tax as corrected (6.2% of line 3 above)	$2,049
5. Less: Allowable credits (line 27 below)	$1,407
6. Corrected tax	$642
7. Less: Unemployment tax as reported or previously adjusted	$208
8. Delinquent tax, or increase (decrease) in tax	$434
9. Penalties IRC Sec 6656: $43.00 IRC Sec 6662(a): $87.00	$130

Computation of allowable credits (contribution paid to state unemployment fund and additional credits)

10. State	WA	
11. Experience rate period	1994	
12. Experience rate (5.4% if actual experience rate exceeds 5.4%)	5.40%	
13. Correct FUTA wages	$33,050	
14. Taxable Payroll (as defined in State Act)	$26,050	
15. 5.4% of line 14	$1,407	
16. Less: Contributions payable at experience rate (line 14 x line 12)	$0	
17. Additional credit (line 15 less line 16)	$1,407	
18. Contributions timely paid	$0	
19. 90% of the lesser of (a) late contributions (b) line 16 less line 18	$0	
20. Tentative credits (sum of lines 17, 18 and 19)	$1,407	
21. Credit reduction rate	0.00%	
22. Credit reduction (line 12 x line 21)	$0	
23. Total tentative credits (sum amounts on line 20)		$1,407
24. 5.4% of line 3 above		$1,785
25. Lesser of line 23 or line 24		$1,407
26. Total of line 22		$0
27. Allowable credits (line 25 less line 26)		$1,407

Other Information

APPENDIX I

UNITED STATES TAX COURT

[Filed Jan. 29, 2002]

Docket No. 12686-99
Employment

WESTERN MANAGEMENT, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER

On September 21, 1999, respondent filed a Motion to Dismiss In Part for Lack of Jurisdiction and to Strike as to for Assessment by the Respondent, which was granted by the Court by Order dated October 14, 1999.

Section 314 (f) of the Community Renewal Tax Relief Act of 2000, P.L. 106-554, 114 Stat. 2763, amended section 7436 (a) of the Internal Revenue Code to authorize this Court to decide "the proper amount of employment tax under such determination." The legislative amendment, enacted on December 21, 2000, is retroactively effective as if included in the provisions of the Taxpayer Relief Act of 1997. Section 314 (g), Community Renewal Tax Relief Act of 2000.

The foregoing considered, it is

ORDERED that the Court's Order dated October 14, 1999, is vacated and set aside. It is further

ORDERED that respondent's motion to dismiss and to strike filed September 21, 1999, is denied.

/s/ Thomas B. Wells
Chief Judge

Dated: Washington, D.C.
February 8, 2001

APPENDIX J

UNITED STATES TAX COURT

[Filed Jan. 29, 2002]

Docket No. 12686-99
Employment

WESTERN MANAGEMENT INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION

It is hereby stipulated that, for the purpose of the trial of the amounts of employment taxes pursuant to the Order of Chief Judge Thomas B. Wells dated February 8, 2001, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto may be accepted as authentic and are incorporated in this stipulation and made a part hereof; provided, however, that either party has the right to object to the admission of any such facts and exhibits in evidence on the grounds of relevancy and materiality, but not on other grounds unless expressly reserved herein, and provided, further, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

_____. During 1994 and 1995 Robert E. Kovacevich was a duly licenced attorney to practice law in the State of Washington.

_____. All the Petitioner's Employer's Quarterly Federal Tax Returns, Form 941, for the five quarters, January 1, 1994 through March 31, 1995 were filed timely.

_____. From the time Petitioner filed it's Articles of Incorporation with the Secretary of State in 1981 and through 1997, Robert E. Kovacevich and Yvonne R. Kovacevich were directors of Petitioner.

_____. Respondent is not relying upon the Twenty Common Law Factors to establish that Robert E. Kovacevich is an employee of Petitioner.

_____. The calculation in the Notice of Determination Concerning Worker Classification Under Section 7436 was incorrect with respect to the Old Age, Survivors, and Disability (OASDI) portion of the Federal Insurance contributions Act (FICA) tax for the second and third quarters of 1994. In the notice of determination, the OASDI portion of the FICA tax was calculated upon the entire amount ($33,000) of remuneration paid in the second and third quarters of 1994. But in 1994, the wage base ($60,600) was reached during the second quarter. As a result, the OASDI portion of FICA for the second quarter of 1994 should have only been calculated on $27,600 in wages paid. Similarly, the calculation of the OASDI portion of the FICA tax in the third quarter should have been zero.

DATED: January 29th, 2002.

Richard W. Skillman
Acting Chief Counsel
Internal Revenue Service

By: /s/ Robert E. Kovacevich
ROBERT E. KOVACEVICH
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By: /s/ Milton B. Blouke
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APPENDIX K

26 U.S.C. § 3121(a)(c). Definitions

(a) Wages.—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(c) Included and excluded service.—For purposes of this chapter, if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employee for such period shall be deemed to be employment; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment. As used in this subsection, the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. This subsection shall not be applicable with respect to services performed in a pay period by an employee for the person employing him, where any of such service is excepted by subsection (b)(9).

(d) Employee.—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit prod-

ucts, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;

(B) as a full-time life insurance salesman;

(C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations; if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed; or

26 U.S.C. § 6201(2)

(2) Federal unemployment tax.–No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

26 U.S.C. § 6601.(i) Interest on underpayment, nonpayment, or extensions of time for payment, of tax

(i) Exception as to Federal unemployment tax.—This section shall not apply to any failure to make a payment of tax imposed by section 3301 for a calendar quarter or other period within a taxable year required under authority of section 6157.

26 U.S.C. § 7436 Proceedings for determination of employment status

(A) Creation of remedy, –If, in connection with an audit of any person, there is an actual controversy involving a determination by the secretary as part of an examination that—

(1) one or more individuals performing services for such person are employees of such person for purposes of subtitle C, or

(2) such person is not entitled to the treatment under subsection (a) of section 530 of the Revenue Act of 1978 with respect to such an individual, upon the filing of an appropriate pleading, the Tax Court may determine whether such a determination by the Secretary is correct and the proper amount of employment tax under such determination. Any such redetermination by the Tax Court shall have the force and effect of a decision of the Tax Court and shall be reviewable as such.

(e) Employment tax.—The term "employment tax" means any tax imposed by subtitle C.

CREDIT(S)

(Added Pub.L. 105-34, Title XIV, § 1454)a, Aug. 5, 1997, 111 Stat. 1055, as amended Pub.L. 105-206, Title III, § 3101(b)(1), July 22, 1998, 112 Stat. 731; Pub. L. 106-554, § 1(a)(7) [Title III, § 314(f)], 2000, 114 Stat. 2763, 2763A-643.)

42 U.S.C. § 410(j).

(j) employee

The term "employee' means any officer of a corporation; or any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or any individual (other than an individual who is an employee under paragraph (1) or (2) of this subsection) who performs services for remuneration for any person. (A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal; (B) as a full-time salesman; (C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or (D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations; if the contract of service contemplates that substantially al of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed.

R.C.W. 18.100.010 Legislative intent

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization. (1969 C 122 § 1).

R.C.W. 18.100.060 Rendering of services by authorized individuals

(1) No corporation organized under this chapter may render professional services except through individuals who are duly licensed or otherwise legally authorized to render such professional services within this state. However, nothing in this chapter shall be interpreted to: . . . .

(2)(a) At least one officer and one director of the corporation is duly licensed or otherwise legally authorized to practice the profession in this state; or

R.C.W. 18.100.065 Authority of directors, officers to render same services as corporation.

Except as otherwise provided in RCW 18.100.118, all directors of a corporation organized under this chapter and all officers other than the secretary and the treasurer shall be duly licensed or otherwise legally authorized to render the same specific professional services within this or any other state as those for which the corporation was incorporated.

R.C.W. 18.100.070 Professional relationships and liabilities preserved

Nothing contained in this chapter shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service

and the standards for professional conduct. Any director, officer, shareholder, agent or employee of a corporation organized under this chapter shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable for any negligent or wrongful acts of misconduct committed by any of its directors, officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services.

R.C.W. 50.04.140(c) Employment–Exception tests. Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless and until it is shown to the satisfaction of the commissioner that:

(c) Such individual is customarily engaged in an independently established trade, occupation, profession, or business, of the same nature as that involved in the contract of service, or such individual has a principal place of business for the work the individual is conducting that is eligible for a business deduction for federal income tax purposes; and

Tax Court Rule 70

(b) Scope of Discovery. (1) The information or response sought through discovery may concern any matter not privileged and which is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the trial, if that information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of the burden of proof involved. If the information or response sought is otherwise proper, it is not objectionable

merely because the information or response involves an opinion or contention that relates to fact or to the application of law to fact. But the Court may

Tax Court Rule 71

(a) Availability. Any party may, without leave of Court, serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by an officer or agent who shall furnish such information as is available to the party.

(c) Procedure. Each interrogatory shall be answered separately and fully under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of the answer. The answers are to be signed by the person making them and the objections shall be signed by the party or the party's counsel. The party on whom the interrogatories have been served shall serve a copy of the answers, and objections if any, upon the propounding party within 30 days after service of the interrogatories.

APPENDIX L

Treas. Reg. § 31.3121(c)-1 Included and excluded services.

(c) If less than on-half of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then none of the services of that employee for that person in that pay period shall be deemed to be employment.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following example:

> Example. The AB Club, which is a local college club within the meaning of section 3121(b)(2), employs D, a student who is enrolled and is regularly attending classes at a university, to perform domestic service for the club and to keep the club's books. The domestic services performed by D for the AB Club do not constitute employment, and his services as the club's bookkeeper constitute employment. D receives a payment at the end of each month for all services which he performs for the club. During a particular month D spends 60 hours in performing domestic service for the club and 40 hours as the club's bookkeeper. None of D's services during the month are deemed to be employment, since less than one-half of his services during the month constitutes employment. During another month D spends 35 hours in the performance of domestic services and 60 hours in keeping the club's books. All of D's services during the month are deemed to be employment, since on-half or more of his services during the month constitutes employment.

Treas. Reg. § 31.3121(d)-1 Who are employees.

(5) Although an individual may be an employee under this section, his services may be of such a nature, or performed

under such circumstances, as not to constitute employment (see § 3.3121(b)-3).

(b) Corporate officers. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) Common law employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules.

Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Rev. Rul. 58-505, 1958-2 C.B. 728

The M company is engaged in the mutual insurance business. Certain officers, who perform administrative duties as such for the company, also sell insurance policies for the company aside from and independent of their duties as officers. The company has no right to control or direct the individual in the selling activities either as to result or as to details and means by which that result is accomplished. Held, the individuals are, in effect, serving the company in two different and distinct capacities, that is, as officers and as insurance agents. They are employees for Federal employment tax purposes with respect to duties performed by them as officers of the company, but are not employees for such purposes with respect to their selling activities.

Advice has been requested as to the status, for Federal employment tax purposes, of officers of an insurance company with respect to services performed by them in selling insurance for the company.

The M company is engaged in the sale of insurance policies. The president and the secretary of the company receive salaries for certain administrative services they perform as officers of the company. Separate and apart from such duties, the two officers also sell insurance policies under the company's standard agents' contracts. They are paid for such sales in exactly the same manner as the company pays its regular agents, that is, by a certain commission on each policy sold. The officers are not required, as a part of their official duties, to write insurance for the company. The salary paid to such officers is not related in any way to their services in

writing applications for insurance policies. The company does not have the right to discharge them as employees insofar as their selling activities are concerned, but their services in this respect may be terminated by themselves or the company upon giving 30 days' notice by either party. The company has no right to control or direct them in their selling activities either as to the result to be accomplished or as to the details and means by which that result is accomplished.

Under the regulations applicable to the Federal employment taxes, an officer of a corporation is, in that capacity, an employee thereof unless he performs no services or performs minor services and he does not receive or is not entitled to receive remuneration, directly or indirectly. Therefore, the officers, as such, here involved are employees of the company for the purposes of the Federal employment taxes under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, Subtitle C, Internal Revenue Code of 1954).

As to their sales services, such services, standing alone, are not performed under a degree of direction and control sufficient to constitute the individuals as employees for such activities under the usual common law rules for Federal employment tax purposes.

The question to be resolved is whether their services in the two capacities (as officers and as sales agents) are interrelated. If their services are found to be interrelated, then it could not be said that they were acting in two separate and distinct activities. Interrelated services which, as a whole, contain the elements establishing the existence of a common law relationship of employer and employee would result in a conclusion that, with respect to all services performed by the individuals, they are employee for Federal employment tax purposes. If, however, the services in the two capacities are separate and distinct, that is, if there is no interrelation either

as to duties or remuneration in the two capacities, then the status of each type of service must be considered separately.

In the instant case, based on the facts presented, it is concluded that the services performed by the president and the secretary of the company as officers and as salesmen are not interrelated and that they are, therefore, performing services in two separate and unrelated capacities. Accordingly, they are not employees of the company with respect to the services which they perform for it in selling insurance and the remuneration they receive for such services is not wages for purposes of the Federal employment taxes. Compare Rev. Rul. 58-360, page 423.

The Federal Insurance Contribution Act (but not the Federal Unemployment Tax Act and the Collection of Income Tax at Source on Wages) contains a special statutory provision (section 3121 (d) (3) (B) which includes in the definition of 'employee' a full-time life insurance agent who is not an employee under the usual common law rules applicable in determining the employer-employee relationship.

Under the sales agent contracts between the company and the two officers, it was not the intention of the company that they should be 'full-time life insurance agents.' Furthermore, as a matter of fact they do not perform services as such. Therefore, as to the sales activities of the officers, they are not statutory employees under section 3121 (d) (3) (B) of the Federal Insurance Contributions Act. Income received from such activities constitutes income from a trade or business. Such income, therefore, is subject to the tax imposed on self-employment income by section 1401 of the Code. See Rev Rul. 54-309, C.B. 1954-2, 261.